No. 89-1782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Petitioner,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the doctrine of state sovereign immunity bars an Indian tribe from bringing a damages action against a State in federal court without its consent.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case features an issue of paramount concern to *amici*: the

constitutional principle of state sovereign immunity and the extent to which that principle protects States from being subjected to suit in federal court against their will. This principle, a pivotal component of the federal-state balance as understood by the Framers, has been construed by this Court as an important and lasting attribute of state sovereignty, one that States retain except to the extent that immunity from suit is inconsistent with the constitutional plan.

Amici believe that the Ninth Circuit's conclusion that the States waived their immunity merely by having ceded to Congress legislative authority over Indian affairs rests on a fundamental misunderstanding of state sovereign immunity doctrine. Although acknowledging that no act of Congress had deprived the States of their immunity, and that respondents' suit did not come within any other exception to the rule of immunity, the lower court nevertheless held that Alaska was subject to suit based on what the court perceived to be required by "principles of federalism." This view marks a dangerous departure from this Court's precedents, and, if upheld, extends an unwarranted invitation to the federal courts to intrude upon the States' sovereign prerogatives. For this reason, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

This brief addresses only the first of the questions presented by the petition—whether the doctrine of state sovereign immunity bars an Indian tribe from bringing a damages action in federal court against the State of Alaska without the State's consent. This statement is therefore limited to developments below that bear on this issue.

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[1] The parties' letters of consent, pursuant to Rule 37.3 of the Rules of the Court, have been filed with the Clerk.

In 1980, the Alaska legislature passed a revenue-sharing statute providing financial assistance to unincorporated communities with "a Native Village government." Alaska Stat. § 29.89.050. Shortly after the statute was enacted, the State's Attorney General advised the legislature that the law violated several provisions of the Alaska Constitution because it denied similar benefits to unincorporated communities without a Native Village government. In order to comply with the state constitution, petitioner, Commissioner of the State's Department of Community and Regional Affairs, began to administer the statute for the benefit of all unincorporated communities, whether or not they had Native Village governments. Pet. App. B5-B6.

Respondents, two Native Villages receiving benefits under the original plan, brought suit against the State in federal district court alleging that broadening the class of recipients under the statute violated the Equal Protection Clause of the United States Constitution (by deliberately reducing respondents' benefits on the basis of race), as well as other provisions of federal and state law. In addition to declaratory and injunctive relief, respondents sought damages from the State in the amount that their respective shares under the revenue-sharing program were diluted as the result of broadening the program. Pet. App. B5-B6.

The district court dismissed the case on the alternative grounds that the suit was barred by the Eleventh Amendment and that, in any event, the court lacked subject matter jurisdiction because no federal question was presented. Pet. App. B7.

The Ninth Circuit reversed. After finding that respondents were Indian tribes for purposes of 28 U.S.C. § 1362,[2] the court of appeals held that the State's sovereign immunity posed no bar to the suit. The court ac-

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[2] We express no view as to the merits of this holding.

knowledged that Congress had not expressly subjected the States to suit by Indian tribes in federal court and therefore had not abrogated the States' immunity with the required "unmistakably clear language." Pet. App. B12, quoting *Welch v. Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 478 (1987) (plurality opinion). The court nevertheless held that the State enjoyed no immunity with respect to suits by Indian tribes because the Indian Commerce Clause, Art. I, § 8, cl. 3, "constitutes consent by the states to federal jurisdiction." Pet. App. B13. On this basis, the lower court found it "inherent in the plan of the Constitution" (*id.* at B18) that States are subject to suit by Indian tribes in federal court.

SUMMARY OF ARGUMENT

Finding nothing in the language of the Eleventh Amendment that explains the circumstances in which this Court's cases authorize or prohibit suit against States in federal court, the court of appeals concluded that this Court had opened the door to an open-ended policy analysis under which "the Court's own gloss, the Court's own readings of the amendment's spirit and purpose are what count." Pet. App. B10. Undertaking such a policy-oriented analysis itself, the court of appeals held that "'principles of federalism'" would not be threatened by allowing Indian tribes to maintain suit against the States in federal court. *Id.* at B11 (citation omitted).

The court of appeals' approach was fundamentally misconceived. The language of the Eleventh Amendment has never been the exclusive obstacle to state amenability to suit in federal court because the rule that States may not be sued in federal court is not grounded in that Amendment. The provenance of that rule lies instead in the historic principle of sovereign immunity, which the States retained in joining the Union, surrendering it only to the extent necessary to achieve the constitutional plan.

I. It is inherent in the nature of sovereignty that a State cannot be subjected to suit without consent. As sovereign governments, the States that joined the Union enjoyed such immunity from suit, and retained this immunity in forming a new Union. Neither the creation of a federal judiciary nor the general grants of jurisdiction to the federal courts under Article III of the Constitution were intended to limit or qualify state sovereign immunity. Thus, this Court's decisions have repeatedly confirmed that the doctrine of state sovereign immunity not only survived ratification of the Constitution, but is an essential underpinning of the system of government adopted by the Framers and ratified by the States.

The jurisdictional limitations of the Eleventh Amendment confirm, but by no means exhaust, the constitutional premises of state sovereign immunity. Correcting a holding of this Court that permitted a damages suit against a State by the citizen of another, the Amendment erected a specific jurisdictional barrier to certain suits against States in order to restore the original understanding of Article III. Although bottomed on the same respect for state sovereignty that more generally informs immunity doctrine, the Eleventh Amendment does not and was never intended to provide a comprehensive articulation of state sovereign immunity. Rather, the Amendment was a specific jurisdictional corrective and, as such, is "but an exemplification" of state sovereign immunity. *Welch v. Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 480 (1987) (plurality opinion) (internal quotations and citations omitted).

While state sovereign immunity is not explicitly qualified by any provision of the Constitution, it is nevertheless accepted that the States surrendered some of their immunity by joining a confederation of other sovereigns and agreeing to subject themselves to a supreme federal law. State sovereign immunity is thus

limited to the extent required by the constitutional plan. Such a limitation, however, has been found by this Court in only two discrete contexts. First, the Court has long recognized that the States may not invoke their traditional immunity against federal court suits by the United States or by a sister State. Second, the Court has more recently indicated that Congress, pursuant to legislative authority ceded to it by the States, may abrogate state sovereign immunity provided that it expresses its intention to do so in clear and unequivocal statutory language.

II. This case falls into neither of these exceptions. Assuming that respondents qualify as Indian tribes for present purposes—a question that we do not address—it is plain that the status of Indian tribes within the constitutional plan is not comparable to that of the States or the United States. Thus, while the Framers would have expected States to be amenable to suit brought in federal court by other States or by the United States, they would have found unthinkable the notion that by ratifying the Constitution the States thereby acquiesced to suit by Indian tribes. The Framers' conception of the relationship between tribes and the Union was one in which the latter was obliged to vindicate the interests of the former through appropriate exercises of legislative and executive authority. And, although Congress may some day choose to subject the States to direct suits by Indian tribes in federal court, it has yet to do so. Having concluded as much, the court below should have ended its inquiry and barred this case from going forward.

The court of appeals' reliance on the Indian Commerce Clause was misplaced. The Clause does no more than evidence the States' recognition that Congress should have plenary substantive authority over Indian affairs. The Clause does not of its own force abrogate state sovereign immunity. Indeed, *no* provision of Article I has

the self-abrogating force that the Ninth Circuit ascribes to the Indian Commerce Clause. The decision below both attaches undue significance to the Indian Commerce Clause and renders superfluous the requirement, repeatedly reaffirmed by this Court, that Congress may abrogate the States' immunity only through a statute addressed specifically to that end.

ARGUMENT

I. STATES RETAIN THEIR SOVEREIGN IMMUNITY FROM SUIT UNLESS THEIR SURRENDER OF IMMUNITY IS INHERENT IN THE CONSTITUTIONAL PLAN.

A. Under our federal system, the States are not ordinary litigants. On the contrary, because the States retained essential elements of sovereignty under the federal plan, any analysis of the States' amenability to suit must begin from the premise that, as sovereign governments, they are immune from suit absent their consent. As Hamilton explained, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." *The Federalist* No. 81, at 487 (C. Rossiter ed. 1961) (emphasis omitted).

The "inherent" doctrine of sovereign immunity described by Hamilton not only predated the founding of our Nation, but survived the ratification of the Constitution. Neither the Framers nor the States contemplated that the mere creation of a federal judiciary or assignment of judicial power to the federal courts in any way limited state sovereign immunity. Whatever else the States may have intended in surrendering some portion of their sovereignty to the Union, they did not thereby relinquish their immunity from suit in the newly created federal tribunals. To the contrary: "That a State may not be sued without its consent is a fundamental rule of

jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given * * *." *Ex Parte State of New York, No. 1*, 256 U.S. 490, 497 (1921). See also *Welch v. Texas Dep't of Highways & Public Transportation*, 483 U.S. 468, 479-480 (1987) (plurality opinion); *Employees v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279, 291-292 (1973) (Marshall, J., concurring in the result).

Although the doctrine of state sovereign immunity is often discussed in connection with the jurisdictional limitations of the Eleventh Amendment,[3] the two are not the same. Indeed, we believe that the relationship between the doctrine and the Amendment has over time been the cause of some confusion, as reflected in the decision below. The Eleventh Amendment was crafted to overcome the suggestion that Article III of the Constitution, in extending the judicial power to certain suits involving States, was perforce an abrogation of state sovereign immunity. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Amendment rectified the mistake in that reasoning by limiting the judicial power in the only situation in which Article III by its express terms had suggested that a State might be subject to private suit in federal court.[4] As its plain language indicates,

[3] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[4] As explained in *Employees* (411 U.S. at 291-292) (Marshall, J., concurring in the result):

> It had been widely understood prior to ratification of the Constitution that the provision in Art. III, § 2, concerning "Controversies * * * between a State and Citizens of another State" would not provide a mechanism for making States unwilling defendants in federal court. The Court in *Chisholm*, however, considered the plain meaning of the constitutional provision to be controlling. The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding * * *.

the Amendment was intended as a specific and discrete restriction on the *jurisdiction* of the federal courts—in particular, a restriction on the federal judicial power as to claims against a State by "Citizens of another State, or by Citizens or Subjects of any Foreign State."

This Court has repeatedly rejected the suggestion that the breadth of state sovereign immunity is limited to the Eleventh Amendment's modest jurisdictional corrective. In contrast with the Amendment's limited ambit, the doctrine of sovereign immunity ensures that "[w]ithout [a State's] consent it cannot be sued *in any court, by any person, for any cause of action whatever.*" *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911) (emphasis added). Thus, while the Amendment makes no mention of suits brought against a State by its own citizens, the Court resolved a century ago that such suits nevertheless could not be maintained in the face of a valid claim of state sovereign immunity. *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890). In so holding, the Court emphatically rejected the notion that the jurisdictional provisions of Article III and the corresponding limitations of the Eleventh Amendment are the only constraints on a State's amenability to suit in federal court. Since *Hans*, the Court has had occasion to reaffirm that state sovereign immunity (and not the Eleventh Amendment) bars most suits against States in federal court. *E.g., Smith v. Reeves*, 178 U.S. 436, 447-449 (1900) (barring suit by federally chartered corporations); *Monaco v. Mississippi*, 292 U.S. 313, 329-330 (1934) (barring suit by foreign nations).

The Court has long explained such decisions as guided by "postulates" far more expansive than the literal sweep of the Amendment:

> Manifestly, we cannot rest with a mere literal application of the words of section 2 of article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a "surrender of this immunity in the plan of the convention."

Monaco, 292 U.S. at 322-323, quoting *The Federalist* No. 81, at 487 (A. Hamilton). It has more recently been affirmed that the doctrine of state sovereign immunity "was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2297 (1989) (Scalia, J., concurring in part and dissenting in part). See *Welch*, 483 U.S. at 487 ("The contours of state sovereign immunity are determined" not by the Eleventh Amendment, but "by the structure and requirements of the federal system"); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984) (applying "the fundamental principle of sovereign immunity").

B. In ratifying the Constitution and agreeing to come together as a Union, the States surrendered a portion of their sovereignty to the larger confederation. This Court's cases have recognized that this surrender included some portion of the States' historic immunity from suit—limited, however, to what "the plan of the convention" required. *Monaco*, 292 U.S. at 323. The circumstances

in which the constitutional plan requires that an exception be made to the rule of state sovereign immunity are both narrow and rare, and in fact have been limited to two contexts.

1. First, the concept of a new and workable Union of States required that each sovereign in the confederation be subject to suit by superior and coequal sovereigns. Thus, the Court has recognized as implicit in the constitutional scheme that the United States may sue States in federal court, for absent this authority "the permanence of the Union might be endangered." *Monaco*, 292 U.S. at 329, quoting *United States v. Texas*, 143 U.S. 621, 645 (1892). It is likewise inherent in the constitutional arrangement that States may sue other States in a federal forum because "[t]he establishment of a permanent tribunal with adequate authority to determine controversies between the States * * * was essential to the peace of the Union." *Monaco*, 292 U.S. at 328.

The former limitation on state sovereign immunity reflects the supremacy of the United States under the federal system and its obligation to preserve the stability of the Union. The latter confirms the coequal status of the sister States and the need for a forum to resolve disputes among charter members of the new Nation. In both cases, this Court long ago settled that the States, "by their own consent and delegated authority" (*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838)), acceded to the jurisdiction of the federal courts as a necessary corollary to their participation in the Union. See *Texas*, 143 U.S. at 639 ("The necessity for the creation of some tribunal for the settlement of * * * controversies that might arise [between States], under the new government to be formed, must * * * have been perceived by the framers of the Constitution * * *").[5]

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[5] The Court has likewise deemed " 'inherent in the constitutional plan' " its appellate jurisdiction over cases initiated in state court

2. Second, Congress is empowered in certain circumstances to subject States to suit in federal court. It has been settled for some time that state sovereign immunity necessarily gives way where Congress expressly subjects the States to suit in federal court pursuant to the enforcement provisions of Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). And in *Pennsylvania v. Union Gas*, a majority of this Court confirmed dicta in prior cases that Congress may subject States to suit in federal court when acting pursuant to the Commerce Clause. 109 S. Ct. at 2281-2286 (plurality opinion); *id.* at 2295 (White, J., concurring in part). Cf. *Welch*, 483 U.S. at 475 (plurality opinion) (assuming "without deciding or intimating a view of the question" under Commerce Clause); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985) ("Assuming, without deciding" same point).

Although this principle, at least with respect to the Commerce Clause, is arguably not as logically compelled as the exceptions made for suits by the United States and sister States, it too may be said to be implicit in the constitutional plan: In ratifying the Constitution, the States expressly ceded substantive legislative power to the federal government and acknowledged that they were joining a Union in which federal law would be supreme. The ability of Congress to subject States to federal law followed naturally from this grant of power. Therefore, where Congress regards it as "necessary and proper" to do so, it presumably may create a cause of action against the States and provide for its presumptive enforcement in state courts or, where necessary, in the federal courts. See *Union Gas*, 109 S. Ct. at 2281-2286.

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raising federal questions. *McKesson v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2245-2246 (1990), quoting *Monaco*, 292 U.S. at 329, citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821). See also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816) ("it is plain that the framers of the constitution did contemplate" Supreme Court cognizance of suits arising in state court).

The significant concession by the States was thus in granting Congress the power to make substantive law and agreeing to render themselves subject to that law. Having conceded that much, it is arguably a matter of far less consequence whether such law is to be enforced through suit by the United States; by the United States "*ex rel.*" a tribe or individual; or directly by an individual or tribe in its own name pursuant to congressional authorization.

Having ceded such legislative authority to Congress, however, the States may properly insist that *Congress* unmistakably manifest its intention to exercise such authority before they may be subjected to suit in federal court. Because congressional abrogation of state sovereign immunity may "upset[] 'the fundamental constitutional balance betwen the Federal Government and the States'" (*Dellmuth v. Muth*, 109 S. Ct. 2397, 2400 (1989), quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985)), this Court has concluded that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242. See also *Dellmuth*, 109 S. Ct. at 2401 ("evidence of congressional intent must be both unequivocal and textual"); *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2824 (1989) (arguments "not based in the text of the statute * * * are not helpful" to abrogation analysis).

This requirement of a clear statutory directive abrogating immunity is itself implicit in the plan of the convention. To the extent the States can be said to have ceded "powers of abrogation" (*Dellmuth*, 109 S. Ct. at 2400) in entering into the Union, these powers were ceded to Congress, the only branch of the federal government in which the States as States are represented and which, therefore, may be expected to guard against casual encroachments on state sovereignty. For the judicial (or executive) branch to assume the power to abrogate state

sovereign immunity on its own, without clear and unambiguous direction from Congress, would involve an assertion of federal power not contemplated by the Framers and not subject to the political processes that serve to protect against unwarranted intrusion on state sovereignty.

3. As the foregoing confirms, the States retained sovereign immunity except to the extent that a *necessary* implication to the contrary inheres in the language and structure of the Constitution.[6] Consistent with this principle, the Court has properly rejected attempts to find further implied divestitures of state sovereign immunity in the constitutional framework. It has thus been resolved that in ratifying the Constitution, the States nevertheless retained their immunity from suit brought by federally chartered corporations (*Smith v. Reeves*, 178 U.S. at 447-449); by foreign states (*Monaco*, 292 U.S. at 329-330); and by their own citizens (*Hans*, 134 U.S. at 20-21). Such lawsuits, whatever their potential virtues, have not been deemed so essential to the constitutional fabric as to support an assumption of state surrender of immunity. These cases evidence appropriate reluctance to find in the Constitution any surrender of sovereign immunity except as is necessary to preserve the survival of the Union.

C. Although the court below acknowledged that respondents' suit here came within neither of the narrow exceptions to the doctrine of state sovereign immunity identified above, it nevertheless concluded that the State

[6] The Court has recognized that States may allow themselves to be sued in federal court by waiving *both* their sovereign immunity and their Eleventh Amendment immunity. See, *e.g.*, *Welch*, 483 U.S. at 473-474; *Atascadero*, 473 U.S. at 238 n.1, 241; *Pennhurst*, 465 U.S. at 99 n.9. The idea of waiver as applied to a jurisdictional limitation, such as the Eleventh Amendment, has been characterized as "anomalous" (*Employees*, 411 U.S. at 294 n.10 (Marshall, J., concurring in the result)), as it surely is. In any event, no sufficient waiver of sovereign immunity from suit, much less Eleventh Amendment immunity from suit in federal court, has been shown in this case.

of Alaska was subject to suit in this case. The court reached this result based on a subjective and amorphous assessment of what it called "principles of federalism." Pet. App. B11. We submit that state sovereign immunity may not so easily be dislodged. Having concluded that Congress had not abrogated the State's immunity in 28 U.S.C. § 1362 (or any other statute) with the requisite "unmistakably clear" language, and it being plain that Indian tribes cannot claim the constitutional prerogatives of the United States or the several States (see Part II(C), *infra* at 21-25), the Ninth Circuit should have affirmed the dismissal of the complaint.

The appellate court's error, we submit, lay in its failure to appreciate the distinction between sovereign immunity and the jurisdictional bar posed by the Eleventh Amendment. Thus, the court began its analysis by juxtaposing the language of the Eleventh Amendment with this Court's decisions defining the circumstances under which a State may be subjected to suit in federal court. Unable to find a rationale for the Court's decisions in the "literal language of the Eleventh Amendment," the lower court concluded that this Court had "constructed a jurisprudence in respect to this amendment in which the Court's own gloss, the Court's own readings of the amendment's spirit and purpose are what count." Pet. App. B10. The court thus interpreted what it perceived to be departures from the language of the Amendment as inviting a wide-ranging policy analysis guided by "the 'principles of federalism' that inform the amendment" (Pet. App. B11), and proceeded to engage in such an analysis with respect to the issue at hand.

The Ninth Circuit's approach was misguided. This Court's precedents have never endorsed a policy debate of the sort embraced below. The precedents the lower court found difficult to explain were not cases construing the Eleventh Amendment, but instead were cases applying the principle of state sovereign immunity and its limited exceptions. Those cases affirm "the vital role of the

doctrine of sovereign immunity in our federal system." *Pennhurst*, 465 U.S. at 99.

II. THE STATE OF ALASKA RETAINS ITS SOVEREIGN IMMUNITY FROM SUIT BY INDIAN TRIBES.

The issue in this case is whether the respondent Native Villages may, consistent with the sovereign immunity principles outlined above, pursue their monetary grievances against the State of Alaska in federal court. The issue turns on whether Congress unmistakably manifested its intention to abrogate immunity with respect to suit by Indian tribes, and, if not, whether the States implicitly relinquished their immunity from such suits in the plan of the Constitution. We submit that the answer to both questions is no.

A. Congress Has Not Unmistakably Legislated To Subject States To Suit By Indian Tribes.

There is no question, as the court below acknowledged, that 28 U.S.C. § 1362 "does not unmistakably, unequivocally and textually abrogate the state's immunity" from suit by Indian tribes. Pet. App. B12. The language of Section 1362—providing federal jurisdiction over "all civil actions" brought by certain Indian tribes raising federal questions[7]—authorizes federal suit generally; it makes no mention of suits against States. As this Court has made clear, "[a] general authorization for suit in federal court"—such as Section 1362—"is not the kind of unequivocal statutory language sufficient to abrogate" state sovereign immunity. *Atascadero*, 473 U.S. at 246. See also *Welch*, 483 U.S. at 476. Indeed, the language of Section 1362 is practically indistinguishable from formulations that this Court has previously found not to constitute the clear evidence of legislative intent required to abrogate sovereign immunity. See *Atascadero*, 473 U.S. at 245-247 (Section 504 of Rehabilitation Act of 1973, providing for jurisdiction of "any action or proceeding to enforce" the Act, does not evidence clear abrogation of sovereign immunity); *Dellmuth*, 109 S. Ct. at 2400, 2402 (Education of the Handicapped Act, permitting aggrieved parties to bring "a civil action * * * in a district court of the United States," "in no way intimates that the States' sovereign immunity is abrogated").[8]

Certain lower courts have relied on this Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), to conclude that Section 1362 abrogates state sovereign immunity.[9] *Moe* said no such thing. *Moe* stands only for the proposition that the Tax Injunction Act, 28 U.S.C. § 1341, does not bar suits by Indian tribes seeking to enjoin state tax schemes. 425 U.S. at 467-469. Courts divining broader meaning in *Moe* make too much of the Court's suggestion there, "[l]ooking to the legislative history," that Section 1362 "contemplated that a tribe's access to federal court to litigate * * * would be *at least in some respects* as broad as that of the United States suing as the tribe's trustee." *Id.* at 472-473 (emphasis added). As the italicized language makes clear, *Moe* did not equate the prerogatives of the United States with those of Indian tribes with respect to all issues posed by a suit against a State in federal court.

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[7] The full text of Section 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

[8] Like Section 1362, the other federal statutes pertaining to Indian affairs referenced by respondents below (Pet. App. B8-B9) are silent on the issue of state amenability to suit and add nothing to the present analysis.

[9] See, *e.g.*, *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1080 (2d Cir. 1982); *Red Lake Band of Chippewas v. City of Baudette*, 730 F. Supp. 972, 981-982 (D. Minn. 1990) (collecting case law); *Lac Courte Oreilles Band v. Wisconsin*, 595 F. Supp. 1077, 1079-1080 (W.D. Wis. 1984).

Even were *Moe* at one time susceptible to such a reading, this Court's more recent cases have made clear that abrogation language must be unequivocal and that "arguments [that] are not based in the text of the statute * * * are not helpful in determining whether the command of *Atascadero* [requiring unmistakably clear abrogation language] is satisfied." *Hoffman*, 109 S. Ct. at 2824. See also *Dellmuth*, 109 S. Ct. at 2401 ("[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment"). These decisions effectively foreclose overbroad interpretations of *Moe*.

Had Congress intended to abrogate the States' immunity from suit by Indian tribes when enacting Section 1362, it could easily have included appropriately "unmistakable" language in the text. See, *e.g.*, *Union Gas*, 109 S. Ct. at 2278 (noting CERCLA's "explicit recognition of the potential liability of States under this statute"); 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of" enumerated provisions of the Rehabilitation Act of 1973). That Congress chose not to so express itself, even in the wake of this Court's decisions requiring an unequivocal statutory directive, is dispositive.

B. Neither The Indian Commerce Clause, Nor Any Other Constitutional Provision, Of Its Own Force Abrogates State Sovereign Immunity.

Despite the absence of any statement from Congress ("unmistakable" or otherwise) expressing an intention to subject States to suit by Indian tribes, the court of appeals nevertheless concluded that respondents could maintain their suit for monetary relief against the State of Alaska. The court reasoned in part that the Indian Commerce Clause, Art. I, § 8, cl. 3,[10] "constitutes consent

[10] "Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

by the states to federal jurisdiction," and that Indian tribes can therefore sue States in federal court. Pet. App. B13.

We are aware of no authority for the proposition that the Indian Commerce Clause of its own force abrogates state sovereign immunity. This Court has never, for instance, held or intimated that the Fourteenth Amendment *of its own force* effects a waiver of state sovereign immunity; it has determined, rather, that Congress may legislate pursuant to its power under the Fourteenth Amendment to override such immunity. *E.g.*, *Dellmuth*, 109 S. Ct. at 2400 ("Congress, acting in the exercise of its enforcement authority under § 5 of the Fourteenth Amendment, may abrogate the States' Eleventh Amendment immunity"). Likewise, the mere fact that Congress has expansive powers under the Commerce Clause does not *by itself* render the States amenable to suit in federal court. Rather, Congress must exercise its authority to abrogate through legislation. See *Union Gas*, 109 S. Ct. at 2282 ("Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce"); *Hoffman*, 109 S. Ct. at 2827 (Marshall, J., dissenting) (same).

The court of appeals' analysis of the Indian Commerce Clause was thus flawed in two respects. First, the court overlooked that the mere fact that the States have ceded certain substantive *legislative* authority to Congress does not automatically render the States amenable to the *jurisdiction* of the federal courts in suits arising under exercises of that legislative authority. The issues are distinct. In attributing self-abrogating force to the Indian Commerce Clause, the lower court confused Congress's *power* to abrogate immunity with an appropriate *exercise* of that power. As such, the court of appeals rendered superfluous this Court's requirement that Congress express its intention to abrogate state sovereign immunity in unmistakable statutory language.[11]

[11] There is nothing about the Indian Commerce Clause that would warrant a different test. The Clause was added to the Constitution

Second, there is no textual or other basis for the proposition that, of all the powers granted to Congress under Article I, *only* the Indian Commerce Clause effects an automatic waiver of state sovereign immunity irrespective of congressional action. That Congress exercises plenary authority over Indian affairs does not change this analysis. Congress's power under the Bankruptcy Clause is at least as comprehensive (if not more so) as its power under the Indian Commerce Clause; yet the Court has refused to find abrogation of state sovereign immunity as to bankruptcy matters absent an "unmistakably clear" statement abrogating such immunity in the language of the federal bankruptcy statutes. *Hoffman*, 109 S. Ct. at 2822-2824. Likewise, the federal government's plenary authority over relations with foreign nations is surely as broad as any other; once again, however, the States retain their immunity from suit brought by foreign sovereigns. See *Monaco*, 292 U.S. at 330-332 (recognizing States' retention of immunity from suit despite "sovereign prerogative" of the United States over international affairs and the "National government['s] control * * * over our foreign relations"). There is no warrant, therefore, for the lower court's expansive interpretation of the Indian Commerce Clause.

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to confirm that the newly created Congress would have authority to regulate trade with the Indian tribes. It embodies a recognition that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). It was not, however, envisioned by the Framers or ever suggested by this Court that the Indian Commerce Clause was meant to have any broader significance. Accordingly, this Court has rejected overbroad interpretations of the Clause. See, *e.g.*, *Washington v. Confederated Tribes*, 447 U.S. 134, 157 (1980) ("It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes"); *Moe*, 425 U.S. at 481 n.17 (rejecting notion that Commerce Clause provides an "automatic exemption[]" from taxation to Indian tribes).

C. In Ratifying the Constitution, States Did Not Implicitly Consent To Suit By Indian Tribes.

The foregoing confirms that neither the Indian Commerce Clause nor any federal statute provides a textual basis for holding States amenable to suit by Indian tribes. Thus, the sole remaining basis for authorizing such suit is the Ninth Circuit's assertion that the State of Alaska's "consent to federal jurisdiction" in such cases is "inherent in the plan of the Constitution." Pet. App. B18.[12]

This conclusion misconceives the status of the Indian tribes in the constitutional plan, on the one hand, and the strength of the evidence required to find implicit divestitures of sovereign immunity, on the other. As discussed above, it is both plausible and necessary to suppose that in forming a new Union, the States implicitly vested in the new federal government the authority to bring suit against States where necessary for the national good. It is likewise fair to conclude that in entering into a Union, the States recognized their sister States as coequals, and that disputes between them might be resolved in an impartial federal tribunal if peace among them was to be preserved.

No similar conclusion can be drawn with respect to Indian tribes. The status of Indian tribes in the constitutional plan has never been thought comparable to that

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[12] As the court below acknowledged, this holding flatly contradicts this Court's observation, six decades ago, that "[t]he reason the Indians could not bring" suit against Minnesota for monetary relief "lies in the general immunity of the State and the United States from suit in the absence of consent." *United States v. Minnesota*, 270 U.S. 181, 195 (1926). See *ibid.* (treating "as fact" that Indians "could not sue the State"). *Cf. Arizona v. California*, 460 U.S. 605, 614 (1983) (assuming "that a State may interpose its immunity to bar a suit brought against it by an Indian tribe"). That the Court has never in the years since *Minnesota* been forced to reconsider these comments suggests the novelty of the Ninth Circuit's conclusion that the States "consented" to suit by Indians when they ratified the Constitution.

of the United States or the States. The Indian tribes are not superior sovereigns, like the United States. And the tribes are not coequals, like sister States, in the constitutional scheme. The Indian tribes retain their sovereignty only at the sufferance of the Union. See *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). The tribes were not parties to the debates leading to ratification of the constitutional plan, were not necessary signatories to that plan, and cannot be equated with the United States or the States for immunity purposes.

The court of appeals' conclusion also cannot be squared with the relationship among the United States, the States, and the Indian tribes as it was understood to exist at the time that the Constitution was conceived. In ceding plenary authority over Indian affairs to the federal government, the States acknowledged the need to address matters pertaining to Indian tribes on a national scale.[13] It was with the blessing of the States, therefore, that Indian tribes came "completely under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). What emerged was a trust relationship between the new Nation and the Indian tribes "unlike that of any other two people in existence." *Id.* at 16. Pursuant to this relationship, Indians were to "look to our [federal] government for

[13] Thus, Hamilton observed that the danger posed by neighboring Indian tribes, like that posed by foreign nations, "is common" to all States; that "the means of guarding against" this danger "ought in like manner to be the objects of common councils, and of a common treasury"; and that requiring each State to fend for itself vis-a-vis Indian tribes "would neither be equitable as it respected" those States particularly exposed, "nor safe as it respected the other States." *The Federalist* No. 25, at 163. The Framers considered it equally vital that the national government have "the sole and exclusive right of regulating the trade" with Indian tribes (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)), and principal responsibility for "preventing their exploitation" as to land claims (*Heckman v. United States*, 224 U.S. 413, 433 (1912)).

protection; rely upon its kindness and its power; [and] appeal to it for relief to their wants." *Id* at 17. For its part, the United States acquired "special trust obligations requiring [it] to adhere strictly to fiduciary standards in its dealings with Indians." F. Cohen, *Handbook of Federal Indian Law* 207 (1982). The United States discharged its trust obligations to the Indian tribes in large part through legislation and, until 1871, through its treatymaking powers.[14] In addition, it was early on established (and more often simply assumed) that the United States could sue in federal court to vindicate Indian interests. See *Minnesota*, 270 U.S. at 194 (noting the United States' "right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations" toward Indian tribes.) See also *Heckman v. United States*, 224 U.S. 413, 439-444 (1912); *United States v. Rickert*, 188 U.S. 432, 444 (1903).

Whatever modern minds may think of this legacy, the Framers plainly envisioned the new Nation's relationship with the Indian tribes as that of a benign protectorate, "resembl[ing] that of a ward to his guardian." *Cherokee Nation*, 30 U.S. at 17. See also *Rickert*, 188 U.S. at 437 (it "has always been recognized by the Executive and by Congress, and by this court," that the Indians "are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition"); *Heckman*, 224 U.S. at 437 ("[o]ut of [the Nation's] peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed"). From the perspective of the Framers, therefore, there would have been no more reason to envision Indian tribes commencing suit in federal court (much less suit against States) than to expect a ward to bring suit on his own behalf unaccompanied by his guardian.

[14] In that year, Congress enacted legislation ending the process of treatymaking with the Indians. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as carried forward at 25 U.S.C. § 71).

Against this backdrop, we believe that the Framers would have thought remarkable the notion that in ratifying the Constitution the States were somehow consenting to private damages suit by Indian tribes.[15] This is not to demean the sovereignty of the Indian tribes or to deny their special place in our system of government. It is rather to acknowledge that the status of the Indians, however unique, cannot fairly be equated with that of the States, or the United States, under the constitutional plan.

The conclusion that Indian tribes enjoy no inherent right to sue States in the federal courts does not, of course, leave the tribes without recourse against encroachment on their rights. The States may elect to waive their sovereign immunity, as they have done in other contexts. In addition, the United States retains it prerogative—indeed, its duty—to vindicate Indian rights, including, where necessary, through litigation on behalf of Indian tribes against States. And, as indicated

[15] This proposition would have been unthinkable at a time when the status of Indians as citizens of the Union or the States was seriously doubted; when Indians could not directly bring suit in federal courts; and when it remained uncertain "[w]hat description of Indians are to be deemed members of a State." *The Federalist* No. 42, at 269 (J. Madison). Nothing in the colonial history, nor in the debates leading up to ratification of the Constitution, would have prepared the States for such an outcome. Indeed, the States would have been hard-pressed to comprehend the need for such a remedy when the United States was both empowered and *obliged* to legislate solutions to Indian dilemmas, to execute treaties with Indian tribes, and to bring suit on behalf of Indian tribes where necessary to promote Indian rights.

Nor would Indian suits against States have been considered by the Framers as "essential to the peace of the Union." *Monaco*, 292 U.S. at 328. Peace with the Indians was to be secured, and was in fact secured, through treatymaking with the United States, not private litigation with individual States. See, *e.g.*, *Heckman*, 224 U.S. at 430 ("serious controversies" with the Eastern Cherokees were resolved by treaty). See generally F. Cohen, *supra*, at 62-107 (reviewing history of treatymaking with Indian tribes).

above, Congress may enact a federal right of action in favor of Indian tribes, provided it does so in unequivocal statutory language.[16] That the States may not be further accountable to Indian tribes through private suits for monetary relief in federal court is, as with all other instances of state sovereign immunity, simply "a necessary consequence of * * * a system of dual sovereignties." *Welch*, 483 U.S. at 488.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[16] Moreover, the Eleventh Amendment does not bar Indian tribes —any more than it bars any other litigant—from seeking prospective declaratory and injunctive relief from States, as respondents in part seek here. See *Edelman v. Jordan*, 415 U.S. 651 (1974). Indian tribes may also sue state officials (*Ex parte Young*, 209 U.S. 123 (1908)) as well as local governments under 42 U.S.C. § 1983 (*Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978)).